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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID MARTINEZ,

Defendant and Appellant.

E054025

(Super.Ct.No. FSB804265)

OPINION

APPEAL from the Superior Court of San Bernardino County. J. David Mazurek,
Judge. Affirmed.

Carl Fabian, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Melissa Mandel, and Scott C.
Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

While he was an inmate at Calipatria State Prison, defendant David Martinez

solicited Marco Sanchez to murder Robert Cervantez. A jury convicted defendant of solicitation of murder in violation of Penal Code section 653f, subdivision (b).¹ The jury found true the related gang enhancement. The court also found true the allegation of a prior conviction. The trial court sentenced defendant to a total prison term of 21 years.

On appeal defendant argues the trial court erred in allowing as impeachment the guilty plea of codefendant Erika Hernandez. Defendant also contends there was insufficient evidence to support the gang enhancement and there was instructional error. After due consideration, we affirm the judgment.

II

STATEMENT OF FACTS

A. Prosecution Evidence

On July 2, 2008, defendant made numerous collect telephone calls from prison to his girlfriend, Hernandez. The calls were monitored by prison officials. During the calls, defendant bragged about testimony from his trial stating that his gang owned or controlled a neighborhood in Redlands. Defendant berated Hernandez about visiting someone else and he accused her of being unfaithful to him.

At one point, Hernandez put her son, Manual, on the phone and he told defendant that Hernandez had been beaten up by Cervantez. Defendant interrogated Hernandez about what had happened and she described how Cervantez had approached her, knocked her glasses off, and hit her in the jaw and throat when she had come over to borrow

¹ All further statutory references are to the Penal Code unless stated otherwise.

cigarettes.

At defendant's behest, another person, Sanchez, came on the phone and defendant demanded that Sanchez shoot Cervantez or be shot himself. Defendant threatened Sanchez and ordered him to act in two weeks or face the consequences when defendant was released from prison. Then defendant yelled some more at Hernandez. Defendant asked her if Sanchez had a gun and Hernandez said she believed he had two. Their conversation continued on the topic of Hernandez's purported unfaithfulness. Defendant again exhorted Sanchez to kill Cervantez before defendant was released from prison.

Cervantez testified while in custody. He claimed he and defendant were good friends but he did not know Hernandez. He denied any gang involvement although he did have gang tattoos. He admitted having been arrested years before with a girl named "Stoney," who had lived with defendant, but he denied hitting her in July 2008.

Sanchez also testified while in custody. Although he had known defendant for 10 years and lived across the street from him, he claimed he did not know defendant's girlfriend's name or that defendant was a member of the Northside Redlands gang. Sanchez did not know Cervantez. Sanchez had gang tattoos but he denied being a gang member. Sanchez admitted he was arrested on July 18, 2008, carrying a handgun.

Hernandez, also in custody, testified that she had known defendant since childhood. She lived with her son, defendant, and his mother, across the street from Sanchez. Cervantez was a former neighbor. Hernandez denied that defendant was in the Northside Redlands gang but admitted he had a number of gang tattoos. In 2000, Hernandez and Cervantez were arrested for automobile theft. In July 2008, Cervantez

confronted her and hit her in the face. She went home and talked to defendant on the phone. Her son told defendant that she had been assaulted. Defendant asked her to enlist Sanchez's assistance. Hernandez listened to the recorded phone calls as they were played to the jury and she did not dispute the accuracy of their content.

B. Gang Evidence

Corporal Mayfield, a Redlands police officer, testified as a gang expert. Mayfield described Northside Redlands as a criminal street gang and Cervantes and Sanchez as active gang members. Based on defendant's admissions, his conduct, and his gang tattoos, defendant was also an active gang member.

Mayfield testified that the Northside Redlands gang had about 150 to 200 members. Mayfield had investigated about 150 crimes in which Northside Redlands was involved. Mayfield stated that Northside Redlands gang members repeatedly engaged in crimes of petty theft, grand theft, robbery, murder, hits on other gang members, and drug sales on their turf.

The predicate offenses committed by Northside Redlands gang members included a 2006 assault on a police officer and felony evading with a gang enhancement, committed by Rudy Beltran, and a 2008 robbery with a gang enhancement, committed by Tommy Hearn and Moises Flores. Beltran pleaded guilty only to felony evading with a gang enhancement.

C. Defense Evidence

Defendant was 37 years old at the time of trial in April 2011. He had been a member of the Northside Redlands gang since he was in the sixth grade. Defendant was

a “loko,” an important gang member. Sanchez and Cervantez were only associates, not members. A loko’s girlfriend was regarded as untouchable.

Defendant knew his phone calls were being monitored. Because he believed Hernandez had been unfaithful to him, he warned her not to visit certain places. Defendant had ordered Cervantez to confront Hernandez to keep her in check. Defendant did not intend to have Cervantez killed. Defendant asserted that Sanchez knew defendant made the statements about killing Cervantez only for show.

On cross-examination, defendant admitted that Hernandez had agreed against his advice to a plea bargain for five years.

III

HERNANDEZ’S GUILTY PLEA

After defendant testified that his threats against Cervantez were fabricated, the trial court admitted evidence of Hernandez’s guilty plea to impeach defendant’s testimony. The trial court reasoned that, if defendant’s conversation about Cervantez was a hoax, he would have communicated that information to Hernandez to dissuade her from accepting a five-year prison sentence. The court instructed the jury that the evidence of Hernandez’s plea was not evidence of defendant’s guilt. Instead, it was offered “on the issue of his credibility or the believability of his testimony.”

We review the trial court’s rulings on evidentiary matters for an abuse of discretion. (*People v. Coddington* (2000) 23 Cal.4th 529, 587-588.) The trial court excludes evidence that is more prejudicial than probative. (*People v. Branch* (2001) 91 Cal.App.4th 274, 281-282, 286; Evid. Code, § 352.) A codefendant’s guilty plea is not

admissible to show a defendant's guilt as proof by association. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1322; *People v. Neely* (2009) 176 Cal.App.4th 787, 795.)

We agree with the trial court that Hernandez's plea was not offered as proof of defendant's guilt. Rather it was offered to show that defendant's explanation that it was a joke when he ordered Sanchez to kill Cervantez was implausible in view of Hernandez's willingness to accept a prison term. The federal cases relied upon by defendant all involved the failure to give a limiting instruction. In this case, however, it is presumed the jury followed the court's admonition that the evidence was not offered to show defendant's guilt.

We also reject defendant's characterization of the "four erroneous factual premises" underlying the trial court's rulings. Those premises—which overlap somewhat—are that defendant could have dissuaded Hernandez from pleading guilty because she could have raised the same defense that the threats made against Cervantez were a hoax but she pleaded guilty because no such defense really existed. There is no support in the record for defendant's assertion, citing *People v. McCoy* (2001) 25 Cal.4th 1111, that the trial court based its ruling on the erroneous assumption that defendant and Hernandez's liability was co-extensive. What the trial court actually said was it was not reasonable that defendant would have allowed Hernandez to accept a prison sentence based on a joke. Therefore, Hernandez's guilty plea was relevant and probative, subject to a limiting instruction.

Additionally, any error was harmless in view of the evidence of defendant's guilt. (*People v. Leonard* (1983) 34 Cal.3d 183, 189.) The powerful combination of the

testimony of Hernandez, the patently false testimony of Sanchez and Cervantez, the recordings of defendant's repeated demands that Cervantez be killed, and defendant's own improbable testimony, all offered overwhelming support of defendant's culpability. Hernandez's guilty plea was of tangential value given that she testified in detail about the attack by Cervantez and the phone calls. Hernandez's testimony served to corroborate strongly the prosecution's case. The fact she pleaded guilty, while relevant to her and defendant's credibility, was not something the prosecution needed to establish defendant's culpability. Even without Hernandez's guilty plea, it is unlikely defendant would have obtained a more favorable result. Furthermore, the trial court's evidentiary ruling did not infringe on defendant's federal constitutional rights of due process and a fair trial. (*People v. Harris* (2005) 37 Cal.4th 310, 336; *People v. Marks* (2003) 31 Cal.4th 197, 226-227.)

IV

SUFFICIENCY OF GANG EVIDENCE

Defendant contends there was insufficient evidence presented by the prosecution to establish a gang enhancement under section 186.22, subdivisions (e) and (f). (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1222; *In re Alexander L.* (2007) 149 Cal.App.4th 605, 611-614.) Defendant argues that the only predicate offense was the 2008 robbery involving an iPod. Otherwise, nonspecific drug sales and felony evading do not qualify as predicate offenses under section 186.22, subdivision (e). In the alternative, defendant maintains it was reversible error for the trial court not to instruct the jury based on

CALCRIM No. 1401 about the meaning of drug sales. We apply a deferential standard of review. (*Alexander L.*, at p. 610.)

The opinion of an expert that a gang’s primary activities are statutorily enumerated felonies is sufficient evidence to support a gang enhancement. (*People v. Gardeley* (1996) 14 Cal.4th 605, 620.) “To trigger the gang statute’s sentence enhancement provision (§ 186.22, subd. (b)), the trier of fact must find that one of the alleged criminal street gang’s primary activities is the commission of one or more of certain crimes listed in the gang statute. In *People v. Gardeley, supra*, 14 Cal.4th 605 (*Gardeley*), that requirement was satisfied by the testimony of a police gang expert who expressed his opinion that the primary activities of the group in question were drug dealing and witness intimidation, both statutorily listed crimes. (See *Gardeley, supra*, 14 Cal.4th at pp. 611, 620.)” (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 322; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1465-1466; *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1329; *People v. Margarejo* (2008) 162 Cal.App.4th 102, 107.)

Here Mayfield, the gang expert, testified that Northside Redlands gang members repeatedly engaged in theft, robbery, murder, drug sales, and hits on other gang members—sufficient evidence to satisfy the primary-activities elements of the gang enhancement. The predicate offenses of a convicted robbery and a charged assault on a police officer, and the present offense of soliciting murder corroborated Mayfield’s testimony about the gang’s primary activities. Unlike the expert testimony in *In re Alexander L., supra*, 149 Cal.App.4th at pages 611-614, Mayfield’s testimony did not

lack adequate foundation or reliability. Sufficient evidence supported the jury's finding that Northside Redlands was a criminal street gang.

We also conclude that any error in not instructing the jury about the elements of drug sales was harmless. Although defendant did not request such an instruction from the trial court, the court did instruct the jury on murder and assault with a deadly weapon. The prosecution needed to prove only one primary gang activity. In this case, the jury was instructed on murder as a primary activity of the gang and also instructed on the elements of murder. In light of the gang expert's unchallenged testimony about murder, failure to instruct on the elements of drug sales was harmless error beyond a reasonable doubt. (*People v. Sengpadychith, supra*, 26 Cal.4th at p. 326.)

V

DISPOSITION

The trial court did not err in allowing admission of the guilty plea of codefendant Hernandez. Sufficient evidence supported the gang enhancement and any instructional error was harmless. We affirm the judgment.

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CODRINGTON

J.

We concur:

HOLLENHORST

Acting P. J.

RICHLI

J.